

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

75-7051

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 75-7051

FIRST NATIONAL BANK OF HOLLYWOOD,
DOROTHY BUCHMAN and SANDER BUCHMAN,
as Executors of SAMUEL BUCHMAN,
Deceased,

Plaintiffs-Appellees,

-against-

AMERICAN FOAM RUBBER CORP., MILTON R.
ACKMAN, as Trustee of AMERICAN FOAM
RUBBER CORP., Bankrupt,

Defendants,

MARIE LOUISE deMONTMOLLIN, ALEXANDER
F. PATHY and SUZANNE M. PATHY,

Defendants-Appellants.

On Appeal from the United States District
Court for the Southern District of New York

PLAINTIFFS-APPELLEES MEMORANDUM ~~IN~~ SUPPLEMENTING APPELLES
~~OPPOSITION TO DEFENDANTS-APPELLANTS~~
PETITION FOR A REHEARING.

JACOB E. HELLER
JOSEPH HELLER
Attorneys for Plaintiffs/
Appellees
51 Chambers Street
New York, N.Y. 10007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
FIRST NATIONAL BANK OF HOLLYWOOD,
DOROTHY BUCHMAN et al., :

Plaintiffs-Appellees :

-against- :

75-5071

AMERICAN FOAM RUBBER CORP. et al., :

Defendants

MARIE LOUISE deMONTMOLLIN, et al., :

Defendants-Appellants

-----X
MEMORANDUM ~~IN OPPOSITION TO DEFENDANT-APPELLANTS'~~
~~SUPPLEMENTING APPELLES~~ PETITION FOR A REHEARING

Appellants' disappointment and that of Appellee in this Court's decision is endemic to litigation. It cannot be the basis of a rehearing.

We are mindful of the consideration given by this Court to this case.

It is because we believe this Court overlooked the matters we have set forth on our request for a review that we felt duty bound to direct this Court's attention thereto.

We could not have addressed ourselves to this Court's holding on the "dividend in bankruptcy portion of the judgment" because this position was not taken by appellant or raised in the Court below.

We sincerely believe that this Court has written "new law."

We believe that this "new law: conflicts with the holding by the 9th Circuit. The very novelty in our opinion, warrants further consideration.

The Loan Transaction: Appellant concedes she surrendered to Burlington her \$15,000 debenture. She concedes the entry on the Burlington Books that she was paid and that Burlington's liability was extinguished. Appellant then loaned the sum (\$15,000) due her from Burlington to American Foam Rubber and received a note for \$15,000 from AFR.

Whatever motivated appellant to deprive appellee on this money, it could not possibly work. If appellant decided to extend payment for the debentures she still would be liable.

The fact remains she surrendered the debentures for an agreed sum. The acceptance of a note in payment of an obligation extinguishes the debt. Schalom vs. Zuckerbrat, 20 App. Div (2) 571, 286 N.Y.S. (2) 364. All rights were surrendered with the exchange in payment by note for the debentures. The debentures were surrendered, cancelled and marked paid on the books. No action was ever possible based on the debentures.

Actually, what we have is a breach of an agreement to pay a certain fixed sum of money. In this case, \$15,000. There is no need to measure the quantum of damages. The amount was fixed.

As to costs: We were of the opinion where a party on appeal prevails on all the issues, costs are awarded to such a party; where there is a modification, neither party is awarded costs. Before making the application for a rehearing, appellant, in great haste, served a notice of taxation of costs. The petition for a rehearing followed.

Conclusion: Appellants' petition for rehearing should be denied and appellees' petition be granted to the extent the Court deems proper.

Respectfully submitted,
JACOB E. HELLER and
JOSEPH HELLER
Attorneys for Plaintiffs-Appellees

51 Chambers Street
New York, N.Y. 10007
962-6986

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

CAROLYN SCHLAM being duly sworn, deposes and says: deponent is not a party to the action.
is over 18 years of age and resides at **BROOKLYN, N.Y.**

☒ Affidavit of Service By Mail On **MARCH** 1976 deponent served the within **Memorandum in Opposition**
upon **Winer, Neuberger & Sive, Esqs.** (2) copies
attorney (s) for Deft/Appellants in this action, at **425 Park Avenue, N.Y., N.Y. 10022**
the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Clerk's Office Box

☐ Affidavit of Personal Service On 19 at upon the
deponent served the within
herein, by delivering a true copy thereof to h personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on **MARCH 9th 1976**

The name signed must be printed beneath
CAROLYN SCHLAM

7